

## § 534.405

## 5 CFR Ch. I (1–1–05 Edition)

(ii) If the individual did not elect to remain subject to the SES pay provisions while serving under a Presidential appointment, his or her SES rate may be set upon reinstatement to the SES at any rate within the SES rate range, subject to the limitations in § 534.403(a).

(iii) Setting a rate of basic pay upon reinstatement to the SES under paragraphs (i)(2)(i) and (ii) of this section is considered a pay adjustment for the purpose of applying § 534.404(c).

(j) *Restrictions on reducing the pay of career senior executives.*

(1) An authorized agency official may reduce a career senior executive's SES rate of basic pay by not more than 10 percent for performance or disciplinary reasons, subject to the restriction on reducing the pay of career senior executives in § 534.406(b) or setting pay below the minimum rate of the SES rate range in § 534.403(a).

(2) The SES rate of basic pay of a career senior executive may be reduced without the employee's consent by the senior executive's agency or upon transfer of function to another agency only—

(i) If the senior executive has received a less than fully successful annual summary rating under 5 CFR part 430, subpart C, or has otherwise failed to meet the performance requirements for a critical element as defined in 5 CFR 430.303; or

(ii) As a disciplinary or adverse action resulting from conduct-related activity, including, but not limited to, misconduct, neglect of duty, or malfeasance.

(3) Prior to reducing a career senior executive's rate of basic pay, the agency must provide the senior executive with the following:

(i) Written notice of such reduction at least 15 days in advance of its effective date;

(ii) A reasonable period of time, but not less than 7 days, for the senior executive to respond to such notice orally and/or in writing and to furnish affidavits and other documentary evidence in support of that response;

(iii) An opportunity to be represented in the matter by an attorney or other representative;

(iv) A written decision and specific reasons for the pay reduction at the earliest practicable date after the senior executive's response, if any; and

(v) An opportunity to request, within 7 days after the date of that decision, reconsideration by the head of the agency, whose determination with respect to that request will be final and not subject to further review.

(4) Reductions in pay under paragraph (j) of this section are not appealable under 5 U.S.C. 7543.

[69 FR 70363, Dec. 6, 2004]

### § 534.405 Performance awards.

(a) This section covers the payment of performance awards to career appointees in the Senior Executive Service (SES).

(1) To be eligible for an award, the individual must have been an SES career appointee as of the end of the performance appraisal period; and the individual's most recent performance rating of record under part 430, subpart C, of this chapter for the appraisal period must have been "Fully Successful" or higher.

(2) Individuals eligible for a performance award include:

(i) A former SES career appointee who elected to retain award eligibility under 5 CFR part 317, subpart H. If the rate of basic pay of the individual is higher than the maximum rate of basic pay for the applicable SES rate range, the maximum rate of that SES rate range is used for crediting the agency award pool under paragraph (b) of this section and the amount the individual may receive under paragraph (c) of this section.

(ii) A reemployed annuitant with an SES career appointment.

(iii) An SES career appointee who is on detail. If the detail is to another agency, eligibility is in the individual's official employing agency, i.e., the agency from which detailed. If the appointee is on a reimbursable detail, the agency to which the appointee is detailed may reimburse the employing agency for some or all of any award, as agreed upon by the two agencies; but the reimbursement does not affect the award pool for either agency as calculated under paragraph (b) or this section.

(3) When making recommendations on performance awards, more than one-half of the membership of a Performance Review Board must be career SES appointees. The only exception is if OPM has determined under § 430.307(d) of this chapter that the Board does not have to have a majority of career members when making recommendations on performance appraisals of career appointees because there exists an insufficient number of career appointees.

(4) The agency head must consider the recommendations of the Performance Review Board (PRB), but the agency head has the final authority as to who is to receive a performance award and the amount of the award.

(b)(1) The total amount of performance awards paid during a fiscal year by an agency may not exceed the greater of—

(i) Ten percent of the aggregate career SES rates of basic pay for the agency as of the end of the fiscal year prior to the fiscal year in which the award payments are made; or

(ii) Twenty percent of the average annual rates of basic pay for career SES appointees of the agency as of the end of the fiscal year prior to the fiscal year in which the award payments are made.

(2) In determining the aggregate career SES rates of basic pay and the average annual rate of basic pay as of the end of FY 2003 for the purpose of applying paragraph (b) of this section, agencies must use the annual rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 or special geographic pay adjustment established for law enforcement officers under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), which the SES appointees were receiving at the end of FY 2003.

(c) The amount of a performance award paid to an individual career appointee may not be less than 5 percent nor more than 20 percent of the appointee's SES rate of basic pay as of the end of the performance appraisal period.

(d) OPM shall issue guidance concerning the distribution of performance awards within an agency.

(e) Agencies shall submit their distribution of performance awards, the total amount of awards, and the aggregate payroll or average rate of basic pay as computed under paragraph (b) of this section to OPM no later than 14 days after the date the performance awards are approved by the agency. If OPM determines that an agency's payments do not meet the requirements of law or regulations, the agency shall take any corrective action directed by OPM.

(f) Performance awards must be paid in a lump sum except in those instances when it is not possible to pay the full amount because of the applicable aggregate limitation on pay during a calendar year under 5 CFR part 530, subpart B. In that case, any amount in excess of the applicable aggregate limitation must be paid at the beginning of the following calendar year in accordance with 5 CFR part 530, subpart B. The full performance award, however, is charged against the agency bonus pool under § 534.405(b) for the fiscal year in which the initial payment was made.

[52 FR 2, Jan. 2, 1987, as amended at 55 FR 1353, Jan. 16, 1990; 57 FR 10125, Mar. 24, 1992; 60 FR 6389, Feb. 2, 1995; 64 FR 72889, Dec. 29, 1999; 69 FR 2051, Jan. 13, 2004. Redesignated and amended at 69 FR 70362, 70366, Dec. 6, 2004]

#### **§ 534.406 Conversion to the SES pay system.**

(a) On the first day of the first applicable pay period beginning on or after January 1, 2004, agencies must convert an existing SES rate of basic pay for a senior executive to an SES rate of basic pay that is equal to the employee's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 which the senior executive was receiving immediately before that date, except as provided in paragraph (b) of this section. The newly converted rate is the senior executive's SES rate of basic pay. An agency's establishment of an SES rate of basic pay for a senior executive under this paragraph is not considered a pay adjustment for the purpose of applying § 534.404(c).

(b) An SES member's rate of basic pay, plus any applicable locality-based